A

SUMBANG PROJEKS SDN BHD

v.

TENAGA NASIONAL BHD

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ALIZATUL KHAIR OSMAN JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: W-02(NCVC)-325-02-2012]

C

15 JANUARY 2014

CIVIL PROCEDURE: *Trial - Witness - Allegation of tampering with electricity meter - Consumption of lesser electricity than usual recorded - TNB clerk testified on methodology used in calculation of shortfall -*

D *Whether safe to rely on uncorroborated evidence of clerk - Whether technical personnel should have been called to corroborate accuracy of clerk's calculation - Whether determination of shortfall commencement date arbitrary, random and speculative - Whether claimant discharged evidential burden of proof on quantum*

E

UTILITIES: *Electricity - Usage - Allegation of tampering with electricity meter - Consumption of lesser electricity than usual recorded - Whether charged for offences under s. 37(1), (3) or (14) Electricity Supply Act 1990 to give rise to criminal claim - Whether breach of statutory duty*

F *which gave rise to civil claim - Whether proper test was proof on balance of probabilities*

The High Court had allowed the respondent's claim for RM962,584.73 with interest against the appellant for electricity which the latter had used and not paid for between 28 February

G 2008 and 24 August 2010. The court found that, on balance of probabilities, the respondent ('TNB') had proved that the appellant, its customer, had tampered with TNB's electricity meter at the appellant's factory so as to record that less electricity had been consumed than was actually the case. TNB proved its case

H through three witnesses, two of whom carried out an inspection at the factory, discovered evidence of the tampering and took photographs of that evidence as proof, whilst its third witness, SP3, then a clerk at TNB's billing department, described the methodology she used to determine the date of commencement of

I the tampering as well as the amount the appellant owed. *Inter alia*, SP3 testified that she fixed the commencement date as the day

there was a 'sudden drop' in usage of electricity by the appellant based on certain graphs that she herself prepared. The appellant's director, the sole witness for the company, denied the company had tampered with the electricity meters or that it owed TNB any debt. He contended that if there was any drop in the electricity consumption during the period in question it must have been due to reduced operations at the factory. The High Court, *inter alia*, held the appellant's defence to be a mere denial of the claim. On the issue of quantum, the court accepted the methodology SP3 had used to determine the amount owed. The court found that the appellant had failed to adduce any evidence to show either that the methodology used, or that the period of default in question, was wrong. In the instant appeal, the appellant submitted that the trial judge erred in holding that TNB had proved its case on balance of probabilities when the proper test should have been the criminal standard of proof beyond reasonable doubt because the tampering by a customer of TNB's meter was a criminal offence under s. 37(3) of the Electricity Supply Act 1990 ('the Act'). In any event, the appellant submitted that the quality of TNB's evidence was so unsatisfactory and unreliable that it should not have succeeded in its claim.

Held (dismissing appeal against liability and allowing appeal against quantum)

Per Lim Yee Lan JCA delivering the judgment of the court:

(1) TNB was only required to prove its case on a balance of probabilities as the claim was premised on a breach of statutory duty under s 37(3), which also gave rise to a civil claim under s. 38(3) of the Act. The question whether TNB was entitled to resort to s. 38(3) to found its civil claim, when there was no evidence the appellant was charged and convicted of any offence under s. 37(1), (3) or (14), was never raised as an issue in the statement of defence nor during the trial nor as a ground of appeal here. Instead, the appellant participated fully in the trial as if TNB had the right to sue it pursuant to s. 38(3). The appellant was therefore bound by its pleadings and the conduct of its case and was estopped by *res judicata* from now seeking to raise this point on appeal even if it had wanted to. (paras 37, 38 & 40).

(2) There was no appealable error on the part of the trial judge on the question of liability. The findings and conclusions accorded with the evidence. The court agreed with the trial judge's findings that the appellant's evidence was a mere denial of TNB's claim and did not rebut TNB's evidence that there was tampering. (paras 42-44).

(3) TNB failed to discharge its evidential burden of proof on the quantum of its claim. There was no corroboration on the accuracy of SP3's calculation. It was unsafe for the court to rely solely on the evidence in the absence of any technical personnel, such as an engineer, being called to verify her evidence. Although SP3 claimed that three other senior officers confirmed and approved her calculation of the back-billing, in their absence, this was mere assertion. The selection of 28 February 2008 as the date from which the back-billing was calculated also appeared to be arbitrary, random and speculative. SP3's assumption that a drastic fall in electricity usage in the graph drawn by her indicated that the commencement date of tampering was mere conjecture on her part. Considering the amount of the claim, it was incumbent upon TNB to have adduced a more tangible, reliable and scientific method of calculating the quantum. (paras 50, 52, 53 & 55).

Bahasa Malaysia *Translation Of Headnotes*

Mahkamah Tinggi membenarkan tuntutan responden bagi RM962,584.73 dengan faedah terhadap perayu bagi elektrik yang perayu telah gunakan dan tidak membuat bayaran bagi tempoh antara 28 Februari 2008 dan 24 Ogos 2010. Mahkamah mendapati bahawa, atas imbangan kebarangkalian, responden ('TNB') telah membuktikan bahawa perayu, pelanggannya, telah mengusik meter elektrik TNB di kilang perayu sehingga merekodkan penggunaan elektrik yang kurang daripada yang sebenarnya. TNB telah membuktikan kesnya melalui tiga orang saksi, dua daripadanya yang telah menjalankan pemeriksaan di kilang tersebut, menjumpai keterangan bagi pengusikan dan mengambil gambar-gambar keterangan tersebut sebagai bukti, sementara saksi ketiganya, SP3, seorang kerani di jabatan urusan bil pada masa itu, menerangkan tentang cara yang digunakannya untuk menentukan tarikh permulaan pengusikan dan juga jumlah yang dihutang oleh

perayu. Antara lain, SP3 memberikan keterangan bahawa dia menetapkan tarikh permulaan kerana pada hari itu terdapat 'pengurangan yang tiba-tiba' dalam penggunaan elektrik oleh perayu berdasarkan kepada graf tertentu yang disediakannya sendiri. Pengarah perayu, satu-satunya saksi bagi kilang, menafikan bahawa syarikat telah mengusik meter elektrik atau ia berhutang dengan TNB. Dia menghujahkan bahawa jika terdapat pengurangan dalam penggunaan elektrik dalam tempoh yang dipersoalkan ia mestilah disebabkan pengurangan operasi di kilang tersebut. Mahkamah Tinggi, antara lain, memutuskan bahawa pembelaan perayu adalah penafian tuntutan semata-mata. Atas isu kuantum, mahkamah menerima cara yang digunakan oleh SP3 untuk menentukan jumlah yang terhutang. Ia mendapati bahawa perayu gagal mengemukakan apa-apa keterangan untuk menunjukkan sama ada cara yang digunakan, atau bahawa tempoh kesalahan dalam persoalan, adalah salah. Dalam rayuan ini, perayu menghujahkan bahawa hakim bicara telah terkhilaf dalam memutuskan bahawa TNB telah membuktikan kesnya atas imbangan kebarangkalian apabila ujian yang sewajarnya adalah standard jenayah melampaui keraguan munasabah kerana pengusikan meter TNB oleh pelanggannya adalah kesalahan jenayah di bawah s. 37(3) Akta Bekalan Elektrik 1990 ('Akta'). Walau bagaimanapun, perayu menghujahkan bahawa kualiti keterangan TNB adalah amat tidak memuaskan dan tidak boleh disandarkan sehingga ia tidak sepatutnya berjaya dalam tuntutannya.

Diputuskan (menolak rayuan terhadap liabiliti dan membenarkan rayuan terhadap kuantum)

Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) TNB hanya diperlukan untuk membuktikan kesnya atas imbangan kebarangkalian kerana tuntutan tersebut diasaskan atas pelanggaran kewajipan statutori di bawah s. 37(3), yang juga membangkitkan tuntutan sivil di bawah s. 38(3) Akta. Persoalan sama ada TNB berhak tuntuk menggunakan s. 38(3) untuk mengasaskan tuntutan sivil, apabila tidak ada keterangan bahawa perayu dituduh dan disabitkan atas apa-apa kesalahan di bawah s. 37(1), (3) atau (14) tidak pernah dibangkitkan sebagai isu dalam penyataan pembelaan mahupun semasa

perbicaraan dan juga sebagai alasan rayuan di sini. Sebaliknya, perayu mengambil bahagian penuh dalam perbicaraan seperti TNB mempunyai hak untuk menyamannya di bawah s. 38(3). Perayu oleh itu terikat dengan pliding dan tindakan kesnya dan diestop oleh *res judicata* daripada mencuba untuk membangkitkan perkara ini sekarang dalam rayuan walaupun ia hendak berbuat begitu.

(2) Tidak ada kekhilafan yang boleh dirayukan pada pihak hakim bicara atas persoalan liabiliti. Dapatan dan kesimpulan adalah mengikut keterangan. Mahkamah bersetuju dengan dapatan hakim bicara bahawa keterangan perayu adalah penafian tuntutan TNB semata-mata dan tidak mematahkan keterangan TNB bahawa terdapat pengusikan.

(3) TNB gagal melepaskan beban pembuktian keterangan atas kuantum tuntutannya. Tidak ada keterangan sokongan bagi ketepatan pengiraan SP3. Adalah tidak selamat untuk mahkamah bersandarkan semata-mata pada keterangan tersebut tanpa mana-mana kakitangan teknikal seperti jurutera, dipanggil untuk mengesahkan keterangannya. Walaupun SP3 menyatakan bahawa tiga orang pegawai kanan lain telah mengesahkan dan meluluskan pengiraan bil kebelakangan tersebut, dalam ketidakhadiran mereka, ini adalah pernyataan semata-mata. Pemilihan 28 Februari 2008 sebagai tarikh permulaan pengiraan bil kebelakangan juga jelas arbitrari, sembarangan dan bersifat spekulatif. Anggapan SP3 bahawa pengurangan drastik dalam penggunaan elektrik dalam graf yang dilukisnya menunjukkan permulaan tarikh pengusikan yang adalah agakan semata-mata pada pihaknya. Mempertimbangkan jumlah tuntutan, adalah wajib bagi TNB mengemukakan cara pengiraan yang lebih nyata, boleh dipercayai dan saintifik bagi kuantum.

Case(s) referred to:

EON Bank Bhd v. Hotel Flamingo Sdn Bhd [2005] 5 CLJ 253 HC ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***

Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors & Other Cases [2009] 1 LNS 1234 HC ***(refd)***

Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd [2013] 2 CLJ 697 HC ***(refd)***

Tenaga Nasional Bhd v. JCY HDD Technology Sdn Bhd [2013] 7 CLJ 799 HC ***(refd)***
Tenaga Nasional Bhd v. Takatronics (M) Sdn Bhd & Ors [2010] 1 LNS 1559 HC ***(refd)***
UN Pandey v. Hotel Marco Polo Pte Ltd [1978] 1 LNS 223 HC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37(1), (3), (a), (b), (c), (e), 38(1), (3), (4)
Evidence Act 1950, ss. 101, 102

For the appellant - S K Chan; M/s Vincent Hooi & Chan
For the respondent - Alvin John (Putri Norsyazan with him); M/s Alvin John & Partners

[Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-291-2011]

Reported by Ashok Kumar

JUDGMENT

Lim Yee Lan JCA:

[1] We had earlier allowed the appeal of the appellant ('defendant') and set aside the order of the High Court at Shah Alam dated 20 April 2012 which had awarded to the respondent ('plaintiff') a sum of RM962,584.73 representing the respondent's loss of revenue caused by the appellant's tampering of the respondent's meter installation at its premises. We now give our reasons for our decision. For convenience we will refer to the appellant as the defendant and the respondent as the plaintiff or TNB in this judgment.

Brief Facts

[2] The defendant operates a plastic factory and is a customer of plaintiff. Plaintiff supplies electricity to the defendant at the defendant's premises pursuant to the terms and conditions of a contract for supply of electricity dated 22 September 1998 bearing account number 0143 00431255 10.

[3] The plaintiff's case against the defendant at the High Court was premised on the act of tampering by the defendant of its meter recording devices installed at the defendant's factory as part

of its supply of electricity to the premises. The whole purpose of the tampering was to obstruct the said meter recording devices from recording the accurate flow of electricity, which in turn had resulted in under-registration and under-billing of actual electricity supplied to the defendant to the tune of RM962,584.73 for the period commencing 28 February 2008 to 24 August 2010.

[4] The facts presented by the plaintiff during the trial through its three witnesses, SP1, SP2 and SP3 and accepted by the learned trial judge showed that plaintiff conducted an inspection at the defendant's factory on 24 August 2010 at about 2am by a team led by Encik Mohamad Farid b Abd Kader (SP1). The inspection was conducted in the meter reading room and in the presence of an employee of the defendant's, one Encik Danaran, during which a "clamp" was discovered attached to the bottom of the test terminal block ('TTB').

[5] According to SP1, the clamp, which was a rectangular device (exh. P5), was not part of the plaintiff's original meter installation and should not have been there. It was also discovered that the "clamp" could be easily inserted and removed from the TTB without breaking the meter installation seal.

[6] The purpose of the "clamp" was to interfere with the electricity meter by deviating electricity current away from the meter recording device that had been installed there and to obstruct the said meter from recording the accurate flow of electricity. These actions violated ss. 37(1), 37(3) and 37(14) of the Electricity Supply Act 1990.

[7] The clamp was duly removed and a verification meter, known as 'PWS 2.3', was used to monitor and record electricity flow through the main meter. The results showed a huge percentage of discrepancy in the recording of electricity flow at the main meter before and after the removal of the clamp. The first reading using the PWS 2.3 showed a difference of -88% and a second reading showed -97.24%. The permanent check meter, which was part of the plaintiff's meter installation at the defendant's premises and served as a back-up for the main meter, was also used to monitor the electricity flow and the result showed a similar discrepancy of -92.61% on the first reading and -98.89% on the second reading.

[8] All the readings were duly recorded in the "Borang Pemeriksaan LPC (Large Power Consumer) (P1) prepared by SP1. Photographs of the clamp and the meter installation and the tests done during the investigation were taken by SP2 (En Wan Muhammad Shahril Bin Pakwan Soo) which were duly tendered and marked as exhibits during the trial.

[9] A police report (exh. P8) was duly lodged by SP1 on the 24 August 2010 bearing the number 'PANDAMARAN/006476/10'.

[10] The plaintiff subsequently issued a letter dated 22 October 2010 to the defendant notifying the defendant of its act of tampering which was discovered pursuant to an inspection carried out at its premises on 24 August 2010 and that the said tampering had caused the plaintiff to suffer a loss of revenue in a sum of RM962,584.73. The defendant was invited to provide an explanation on the matter.

[11] On 22 October 2010, the plaintiff issued a "Jadual Borang A" to the defendant informing the defendant that its act of tampering with TNB's meter installation at its premises is an offence under ss. 37(3)(a), (b), (c) and (e) of the Electricity Supply Act 1990 ('the Act') and that electricity supply to its premises would be terminated pursuant to s. 38(1) of the Act. However termination of electricity supply to the defendant's factory was never carried out by the plaintiff.

[12] The defendant *vide* a letter dated 15 November 2010 appealed to the plaintiff to defer the termination of electricity supply to its premises to enable the defendant to carry on with its production. The defendant also indicated in the said latter that it would try to resolve the matter as soon as possible.

[13] The plaintiff subsequently through its solicitors Messrs Alvin John & Partners issued a notice of demand dated 19 January 2011 to the defendant in which the plaintiff claims a sum of RM962,584.73 as loss of revenue caused by the defendant's tampering of its meter installation. Despite the demand the defendant failed and or refused to settle the said sum which prompted the plaintiff to commence this action to claim the said sum together with interest at 8% from date of filing of writ until full payment.

[14] SP3 (Suhaila Binti Mahmud) who at the relevant time was serving at the billing department of the TNB Station at Shah Alam, testified during the trial that amongst her duties was to oversee the billing for consumers, including claims for unlawful electricity usage and under-billing of consumers. She was the one who had prepared the estimated loss and bill adjustment for the defendant's account.

[15] SP3 confirmed that the document known as 'Anggaran Pengiraan Pelarasan Dan Kos Kerugian' (marked as P25A) was prepared by her in the calculation of the back-billing. She also confirmed that the graph (marked as 'P25B') depicted in P25A was prepared by her and the document was checked by one En Shamsukamar Mohd Sharif who was the chief administrative assistant in the Jabatan Peningkatan Hasil SEAL (Zon Selangor) and confirmed by one En Ramli Baba who was the senior manager of the Unit Perkhidmatan Pengguna & Pemasaran Negeri Selangor, Bahagian Pembangunan TNB, and subsequently approved by Ir Ahmad Barodi bin Che Noh, who was the Pengurus Kawasan (Pelabuhan Klang) Bahagian Pembangunan TNB.

[16] SP3 further stated that the document marked as 'P25A' contained precision data on the billings to the defendant before and after adjustment for the period between 28 February 2008 to 24 August 2010 with a line graph depicting the comparative path for both billings pre and post adjustment which was at 'P25B'.

[17] SP3 told the court she picked 28 February 2008 as the starting date for calculating the back-billing because from the graph in P25B she noticed a significant and sharp drop in electricity consumption at the defendant's premises on that date.

[18] SP3 confirmed that based on her calculation, the loss in revenue suffered by the plaintiff due to the tampering of plaintiff's meter recording devices at the defendant's premises was RM962,584.73. This figure was obtained by assessing the total bill for the adjusted period amounting to RM1,862,460.84 and subtracting from it the bills actually issued before the adjustment amounting to RM900,654.22 and adding to the same the costs of the operation of RM778.11.

[19] During cross-examination, SP3 stated that she had prepared the estimates of losses sustained and the back-billing based on the findings of the borang pemeriksaan LPC ('P1'). All her data on electricity consumption of the defendant was available to her from the customer information billing system ('CIBS'). SP3 also confirmed that the suspected date of tampering is estimated by determining the point in time there was a 'sudden drop' in usage and consumption as the defendant was not cooperative in stating the date when they began the tampering and this necessitated rational assumptions to be made on the evidence of the nearest incident of 'sudden drop' which was obtained from the 'billing history' (P26) under the defendant's account.

[20] The plaintiff closed its case after calling three witnesses. The defendant's case was presented through its only witness, SD1, Mr Keun Loke @ Chong Yen Ming, who was the defendant's Director. In his evidence, SD1 denied knowledge of the clamp found at the bottom of the TTB in the meter reading room. He denied that the defendant had tampered with the plaintiff's meter installation at its factory; nor did it authorise any of its workers to tamper with the same. SD1 also stated that electricity readings previously recorded in the bills issued and charged to the defendant were correct as there was no complaint from the plaintiff of any incorrect reading before 24 August 2010. The defendant had also been paying its electricity bills on a regular basis. As proof of his assertion SD1 produced a document described as "Display open items and payments for customer 00431255" (marked as 'D33') and electricity bills issued to the defendant from March 2009 to September 2010 (marked as 'D32A' to 'D32L').

[21] At the conclusion of the trial, the learned High Court Judge ruled in favour of the plaintiff and allowed the plaintiff's claim as per its statement of claim.

[22] In her grounds of judgment dated 20 April 2012, the learned judge found, on the issue of liability, that the plaintiff has proven its case on a balance of probabilities. She found as a fact that based on the evidence of SP1 and SP2 there was tampering of the plaintiff's meter installation at the defendant's premises resulting in the plaintiff undercharging the defendant for actual electricity supplied to the defendant's premises between 28 February 2008 to 24 August 2010.

[23] The learned judge also found that the defendant failed to challenge SP1's and SP2's evidence on discovery of the clamp at the TTB near to the main switch board and that the clamp was effective, when installed at the place it was discovered, in distorting the recording of electricity flow to the meter reading devices.

[24] Thus, the learned judge found that the defence had failed to rebut the issue on liability. In her view, the evidence of the only witness called by the defendant, SD1, was unconvincing and of no probative value to prove the defence case as he had admitted that he has no knowledge of the defendant's daily operations at the factory. SD1 merely made verbal assertions that there was no tampering and that plaintiff's calculations were wrong and that the defendant did not owe any money to the plaintiff. SD1 however did not adduce any cogent documentary proof to show that the drop in electricity consumption at its premises was due to reduced factory production/output between 28 February 2008 to 24 August 2010. The only documents produced by SD1 during trial was of no probative value other than to prove that the defendant had paid for whatever bills issued to it during the relevant period.

[25] The learned judge concluded in her judgment that the defence of the defendant was nothing but a mere denial of the plaintiff's case.

[26] On quantum, the learned judge similarly found that the plaintiff has produced cogent oral and documentary evidence through SP3 to prove that its loss of revenue as a result of tampering was in the sum of RM962,584.73. In coming to such a finding, the learned judge also accepted the method used by SP3 in calculating the back-billing and found that it was more than sufficient to prove the plaintiff's actual loss of revenue.

[27] On the other hand, the learned judge found that the defendant had failed to adduce any evidence to demonstrate that the method used by SP3 to calculate the back-billing was wrong. She also found that the defendant failed to demonstrate to the court that the selection of the period from 28 February 2008 to 24 August 2010 as the basis for the calculation was erroneous and or that the sudden sharp drop in electricity consumption stating from that period was not due to tampering of the meter but was due to reduced factory production.

[28] In the premises, the plaintiff's claim against the defendant for the sum of RM962,584.73 as its loss of revenue was allowed with interest at 8% per annum from the date of filing of writ until full settlement and costs as prayed for in the statement of claim.

Submission In This Appeal

[29] During the hearing of the appeal before us, learned counsel for the defendant made the following submissions in support of this appeal:

(a) The act of tampering by a customer of TNB's meter installation at its premises is a criminal offence under s. 37(3) of the Act. The plaintiff was therefore required to prove its case against the defendant beyond reasonable doubt because of the criminal element involved. The learned High Court Judge was therefore wrong to have held that the plaintiff had proved its claim against the defendant on a balance of probabilities.

(b) The quality of evidence adduced by the plaintiff through its three witnesses both as to liability and quantum was unsatisfactory and unreliable, and did not reach the required standard of proof beyond reasonable doubt.

(c) In particular, some of the unsatisfactory aspects of the plaintiff's evidence were:

(i) SP1 had given evidence that the seal of the meter had not been disturbed and this was proof that there was no tampering of the meter;

(ii) SP1 could not show who placed the clamp at the TTB which he discovered and could not attribute this to the defendant as having placed it there;

(iii) SP1 could not prove that the clamp had the effect of reducing the meter readings;

(iv) SP1 could not explain what the clamp was made of;

(v) SP3 could not explain why she had used the dates between 28 February 2008 to the 24 August 2010 as the period for calculating the back-billing;

(vi) SP1 had stated that a visit to the defendant's premises by the plaintiff's workers on the 6 November 2008 did not reveal the presence of the clamp;

(vii) The readings for the period between 27 June 2005 to the 26 March 2008 were ignored by SP3 which showed an average use of RM33,525.52 a month whereas the average use as calculated by SP3 for the period between 26 March 2008 to 24 August 2010 was RM1,793,128.30 divided by 29 months, which came to RM61,832.01. This was evidence that consumption has increased when in effect it should, on account of the presence of the clamp, actually reduce;

(viii) SP3's method did not consider the possibility that on certain months, the electricity usage would have been less on account of production and operation times being reduced; and

(ix) SP3 never referred to exh. P1 as the basis of her calculation for back-billing.

[30] In conclusion, it was submitted that the learned judge erred when she concluded that the plaintiff had proved its case against the defendant on a balance or probabilities, when the evidence presented by the plaintiff was unsatisfactory and did not reach the required standard of proof beyond reasonable doubt. In the premises, the defendant's appeal should be allowed.

[31] Learned counsel for the plaintiff, on the other hand, submitted before us as follows:

(i) On the point raised that the plaintiff's burden to prove its claim was the criminal standard of proof, this contention is without basis. The plaintiff's claim is a civil claim for loss of revenue as a result of a deliberate action of the defendant in tampering with its meter reading device in order to reduce the bills for its electricity consumption. While the act amounts to an offence under s. 37(3) of the Act, the defendant's act also amounts to a breach of cl. 29 of the contract of supply between the plaintiff and the defendant, under which the plaintiff supplies electricity to the defendant, in which the defendant had agreed to comply with the provisions of the

Act. This being a civil contractual claim, the legal and evidential burden of the plaintiff was to prove its case on a balance of probabilities only;

(ii) On liability, the learned judge had properly assessed and weighed the evidence of SP1 and SP2 against the evidence of SD1 and was convinced that the plaintiff had adduced cogent evidence to prove the presence of the clamp at the TTB; that the clamp had the effect of reducing the electricity flow to the meter reading devices and that the plaintiff did suffer loss of revenue as a result of the tampering. The learned judge also disbelieved the evidence of the defendant's sole witness whose evidence she found to be nothing more than a bare assertion which did not in any way rebut the cogent evidence of the plaintiff in proving its case of tampering;

(iii) The learned judge also accepted the methodology employed by TNB in ascertaining the back-billing in situations where the customer is uncooperative, which is, to look for a 'sudden drop' in electricity demand or usage. The learned judge accepted that such a back-billing method used by the plaintiff represents the most accurate form of calculation that will present a reasonable figure, which was in turn arrived at based upon the average daily use of electricity load used from the date when the tampering was most likely to have commenced, which can be deduced from a drastic fall shown in the electricity usage graph;

(iv) The learned judge had accepted SP3's evidence regarding the method used by her to calculate the backbilling, as it was backed by cogent documentary evidence and that her evidence was sufficient to prove, on a balance of probabilities, the actual loss of revenue suffered by the plaintiff. The learned judge also found no rebuttal evidence from the defendant to prove that the period used for calculation for back-billing was erroneous;

(v) The learned judge was correct in holding the SD1 had failed to show that the period used by TNB for backcharging was incorrect, such as producing cogent documentary evidence to prove that the sudden drop in electricity flow was due to reduction in production rates at its factory;

(vi) The defendant's assertion that third parties could have accessed the meter reading room which was not locked to place the clamping device was without basis when it was proven that the said room was within their factory guarded premises and all activities in the said meter reading room would be well within their knowledge. Being physically responsible for the metering system in the meter reading room and the installations thereat, the defendant failed to adduce evidence of any record keeping to show no unauthorized access thereto;

(vii) During re-examination SP3 had confirmed that the details of findings of the borang pemeriksaan LPC (exh. P1) were fed into the customer information billing system (CIBS) and formed the basis of her calculation;

(viii) The use by TNB of its formula attached to the plaintiff's submission on a 'sudden drop' in demand and usage is the applicable method for determining the period of loss;

(ix) SP1 has proved on a balance of probabilities that the effect of the clamp was to reduce current flowing into the recording meter devices as indicated by the verification meter 'PWS 2.3' and the photographs depicting the discrepancy in the readings detected which are exhibited as 'P14B' to 'P19B';

(x) SP1 has said in re-examination that the clamp can be inserted and removed at the bottom of the TTB without breaking the meter installation 'seal';

(xi) There is no need for SP1 to show who planted the clamp as the case is concerned with losses occasioned by the presence of the clamp which was suspected to be in use from 28 February 2008;

(xii) The substance out of which the clamp was made is also irrelevant to the case as the effect of the clamp on electricity readings has been proved; and

(xiii) SP1 has given evidence that the clamp can be inserted and removed at will and it would be logical to assume that on the occasion of the inspection on 24 August 2010, the defendant's employees had removed the device for the moment.

[32] It was submitted that the plaintiff in this case had discharged both its legal and evidential of proof as provided in ss. 101 and 102 of the Evidence Act 1950 which then shifted the burden of proving its defence to the defendant.

[33] In *EON Bank Bhd v. Hotel Flamingo Sdn Bhd* [2005] 5 CLJ 253, the High Court had observed that the burden of proof was the burden of establishing a case and on the other hand the onus of proof relates to the responsibility of adducing evidence in order to discharge the burden of proof.

[34] While the unchallenged evidence of the plaintiff in totality had overwhelmingly established the plaintiff's case on a balance of probabilities both on liability and quantum, the defence's case remained a bare denial until the end of the trial.

[35] In conclusion, it was submitted that there was no appealable error either on the law or on findings of facts on the part of the learned trial judge to warrant any appellate intervention of this court. The learned judge's findings were based on the oral and documentary evidence adduced by both parties before the court during the trial. She had properly assessed and evaluated the evidence of both parties, including the credibility of witnesses, before finding that the plaintiff's evidence was cogent and reliable while the defendant's evidence was a mere denial. In the circumstances, the plaintiff urged this court to dismiss the defendant's appeal as it is totally devoid of any merit.

Our Decision

[36] As stated earlier, we had allowed the defendant's appeal on the issue of quantum. We did not however disturb the learned judge's finding on the issue of liability. The reasons for our decision are as follows.

[37] We thought the first matter we should quickly deal with is on the point raised regarding the plaintiff's burden of proof of its claim in this case. Having given careful consideration to the respective submission of learned counsel, we found ourselves in agreement with the submission of learned counsel for the plaintiff that the plaintiff's burden of proof in this case is only on a balance of probabilities. We say so for the following reasons.

[38] We note that the plaintiff's claim against the defendant in this case is premised on the breach of a statutory duty in s. 37(3), which also gives rise to a civil claim as provided in s. 38(3) of the Act.

[39] We take cognisance of the fact that there are a number of High Court decisions which had held that before TNB can resort to s. 38(3) to found a civil claim against a customer, it must first satisfy the preconditions laid down in that section (see: *Tenaga Nasional Bhd v. Takatronics (M) Sdn Bhd & Ors* [2010] 1 LNS 1559, *Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 2 CLJ 697 and *Tenaga Nasional Bhd v. JCY HDD Technology Sdn Bhd* [2013] 7 CLJ 799).

[40] Be that as it may, it must at once be stated that in the appeal before us, the record shows that the question of whether the plaintiff is entitled to resort to s. 38(3) to found its civil claim against the defendant (when there was no evidence of the defendant having been charged and convicted of any offence under ss. 37(1), 37(3) or 37(14)) was never raised as an issue in the statement of defence nor before the High Court during the trial nor as a ground of appeal before us. Instead the defendant in this case had participated fully in the trial as if the plaintiff had the right to sue it pursuant to s. 38(3). The defendant is therefore bound by its own pleading and the conduct of its case and is estopped on the principle of *res judicata*, from now seeking to raise this point in this appeal, even if it had wanted to. It is not for the court to make out a case for a party when it was never its case in the first place.

[41] If we may also add that it is to the plaintiff's credit, that in this case, it did not seek to rely on s. 38(4) which allows it to tender a statement regarding the amount of loss of revenue suffered by it as *prima facie* evidence of the payment that has to be made to it by the defendant, and to shift the burden to the defendant to disprove the accuracy of its statement. Not that the plaintiff could, even if it chose to do so, in view of the aforementioned discussion on s. 38(3) of the Act.

[42] Reverting back to the issue on liability, we agree with learned counsel for the plaintiff that there was no appealable error on the part of the learned judge in terms of judicial appreciation of the facts before her which would warrant our appellate intervention on the matter.

[43] We observed that in arriving at her decision on the issue of tampering, the learned judge had given reasons in her grounds of judgment as to why she believed the plaintiff's evidence through its witnesses as opposed to the defendant's sole witness who claims to have no knowledge of the tampering. Her findings and conclusions were supported by the contemporaneous documents and testimony given during the trial by plaintiff's witnesses. In fact, we are of the view that the findings and conclusions of the learned judge on the issue of liability accord with the evidence before her.

[44] We also agreed with the learned judge's findings that the evidence of the defendant through SD1 was a mere denial which did not rebut the plaintiff's evidence that there was tampering. We therefore find no basis to say that the learned judge was plainly wrong in coming to the conclusion that the plaintiff had proven its claim that there was tampering against the defendant on a balance of probabilities. Hence, we dismissed the appeal on the issue of liability.

[45] On the issue of quantum, we observe that the plaintiff in this case has rightly sought to prove its claim for lost revenue like any other civil case without resorting to any presumption or *prima facie* evidence provided in the Act.

[46] The question that arises before us is therefore this: was the learned High Court Judge correct when she found that the plaintiff had proven, on a balance of probabilities, through SP3, the actual quantum of its loss. In other words, based on the totality of the evidence adduced by the plaintiff through SP3 on record, did the plaintiff prove, on a balance of probabilities, that the actual amount of its loss of revenue was in the sum of RM962,584.73.

[47] It is trite law that in a civil claim the legal burden rests throughout with the plaintiff to prove its claim. Until and unless the plaintiff discharges its legal and evidentiary burden of proving its claim, the burden does not shift to the defendant to prove its defence, no matter how weak the defence might be (see: *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA, *UN Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4, *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 and *Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors & Other Cases* [2009] 1 LNS 1234).

[48] In *Syed Mohamed Syed Alwi & Ors*, the learned High Court Judge said at p. 11 of his judgment, to which we agree:

> It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) Evidence Act 1950). The burden of proof of that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish their case. If they fail to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (see: *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; s. 102 Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v. Chinniah* (*supra*) adopting the position stated by the Court of Appeal in *Abrath v. North Eastern Railway Co* [1883] 11 QBD 440 at page 452, said:
>
> > But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty – suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional

> facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.
>
> Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a *prima facie* case, but at the conclusion of the trial the learned judge has found that the position was exactly even, i.e, that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.

[49] In *UN Pandey,* Sinnathury J, in dismissing the plaintiff's case therein, held at p. 4:

> It is not often realised that in civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

[50] Having regard to the aforementioned authorities on burden of proof, and having perused the record of appeal and heard the respective submission of learned counsel for both parties, we are persuaded by the submission of learned counsel for the defendant that the plaintiff has not succeeded in discharging its evidential burden of proof on the quantum of its claim. We say so for the following reasons.

[51] Firstly, we note that the plaintiff called only one witness, SP3, to testify on quantum. We also observed that SP3's position and qualification was that of a clerk (pembantu tadbir) in the plaintiff's organisation with only nine years experience in calculating, *inter alia*, back-billings to be charged to customers.

SP3 in her testimony had purported to describe the technical details of how she worked out the calculations for the back-billing. She had also purported to base the calculation on some comparative graphs drawn by herself and had selected 28 February 2008 as the most likely date of the commencement of the tampering because, to her, there was a sudden and sharp drop in electricity consumption.

[52] It was our view that in the absence of any technical personnel from the plaintiff's organisation, such as an engineer, being called to verify the evidence of SP3 who was just a clerk, it is not safe for the court to rely on SP3's evidence alone as having proven the plaintiff's quantum of its loss of revenue. Although SP3 claimed that three other senior officers had confirmed and approved her calculation of the back-billing, in their absence this amounted to a mere assertion only. In other words, there was no corroboration on the accuracy of SP3's calculation.

[53] We further agree with learned counsel for the defendant that the selection of 28 February 2008 as the date from which the plaintiff calculated the back-billing for its loss of revenue appeared to be an arbitrary, random and speculative way of doing so. We agree with learned counsel that SP3's assumption that a drastic and sudden fall in the graph drawn by her on the electricity flow signified the commencement of tampering was a mere conjecture on her part. There could be a number of reasons why there was sudden drop in the reading of electricity flow in the graph and in the absence of any statutory presumption, it is the plaintiff's duty to adduce positive evidence to prove its assertion that tampering did commence on that date.

[54] In other words, we entertained serious doubt as to the accuracy of the methodology used by SP3 to calculate the back-billing for undercharged electricity consumption at the defendant's premises. We agree with the submission of learned counsel for the defendant that the method of calculation adopted by SP3 in reliance on some graph drawn by her left much to be desired.

[55] Considering that the plaintiff was claiming such a huge amount of money as back-charges, it was incumbent on the plaintiff to adduce a more tangible, reliable and scientific method of calculation than a mere assumption based on some comparative graphs drawn by SP3 and one sudden drop in electricity usage/consumption on a particular date.

[56] In the circumstances, we found the learned High Court Judge erred in her findings that the method used by the plaintiff in calculating the back-billing was a reasonable method and that SP3's evidence was more than sufficient to prove the actual quantum of the plaintiff's claim on a balance or probabilities.

[57] It was for the above reasons that we had allowed the defendant's appeal on quantum and set aside the order of the High Court Judge. We had awarded costs of RM20,000 to the defendant for this appeal and also ordered deposit to be refunded to the defendant.